STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2004-21

May 4, 2004

MAINE PUBLIC UTILITIES COMMISSION
Investigation Into the Request for Approval
of CMP to Offer Backup Generation Equipment
as "Special Facilities" Under Section 13 of
its Terms and Conditions

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

We conclude that Maine's Restructuring Act does not permit Central Maine Power Company (CMP) to own or provide backup generators on the premises of retail customers, including customers who are affiliates, for the stated purpose of maintaining electric service during transmission and distribution system outages. Accordingly, we reject a stipulation presented in this case that would authorize such a result.

II. BACKGROUND

On January 9, 2004, CMP filed a request for Commission authorization to offer backup generating equipment as "special facilities" under Section 13 of its Terms and Conditions. In its filing, CMP states that special facilities are those facilities supplied by the Company that are in addition to, or substitution of, the standard facilities that would normally be installed to provide service. CMP states that the provision of backup generating equipment to customers is a premium service to address distribution reliability concerns. Because the provision of the equipment is in addition to the standard facilities that it would normally provide, CMP's position is that backup generators used to support distribution reliability falls within the definition of "special facilities." However, CMP indicates that Commission authorization may be necessary to provide this service because the Restructuring Act generally prohibits utility ownership of generation.

CMP explains in its filing that it seeks Commission authorization as a result of a request by Utility Shared Services Corporation, an affiliate of CMP located in New Gloucester, Maine, for premium power service (i.e., backup generation and uninterruptible power supply equipment).[1] CMP indicates that, although it will own the equipment, it will not take title to or sell the generated electricity, it will not purchase or own the fuel, and it will not maintain the equipment. Thus, according to CMP, providing the generation

[1] In a subsequent filing, CMP clarified that it proposes to own two diesel generators (250 kW and 125 kW) to provide backup electrical service to two different affiliates of CMP, located in separate buildings on the same leased property at the Pinelands complex in New Gloucester.

equipment is consistent with the special facilities provisions of its Terms and Conditions (Section 13). CMP also states that offering backup generators to customers as a means of enhancing distribution reliability is permitted under the Restructuring Act, 35-A M.R.S.A. § 3204(6), in that it will assist CMP in meeting its transmission and distribution (T&D) utility obligations in an efficient manner. Finally, CMP indicates that it will provide back-up generating facilities on a non-discriminatory basis to all customers requesting such facilities or service.

On January 21, 2004, the Commission issued a Notice of Investigation as a vehicle to consider whether CMP may lawfully provide back-up generation under the special facilities provisions of its Terms and Conditions. In the Notice, the Commission provided an opportunity for intervention and sought comment on a series of questions related to the proposed service. The Public Advocate, the Industrial Energy Consumer Group (IECG), the Independent Energy Producers of Maine, and WPS Energy (collectively referred to as the "Intervenors") intervened and filed comments in this proceeding.

On April 9, 2004, the Examiner issued an Examiner's Report recommending that the Commission conclude that the Restructuring Act does not permit CMP to own or provide backup generators on the premises of its affiliates. On April 21, 2004, CMP filed exceptions to the Examiner's Report together with a proposed stipulation executed by CMP and the IECG. The IECG subsequently filed comments in support of the stipulation. The stipulation would authorize CMP to own generators to provide backup service to its two affiliates in New Gloucester, Maine. Additionally, the stipulation states that the transactions (other than being affiliated interest transactions) would not be subject to Commission regulation and would not be a utility service.

III. COMMENTS OF THE PARTIES

A. Central Maine Power

CMP makes several alternative arguments in support of its position. First, CMP argues that its ownership of the backup generators is not prohibited by the Restructuring Act, because the generators as used in this case do not meet the definition of "generation assets" under 35-A M.R.S.A. § 3201(10). CMP's view is that, because the generators will be used only for backup purposes, the primary purpose of the equipment is not to generate electricity, but rather to provide a customer with greater and more cost effective reliability in the event of an outage. As such, CMP argues that the service is more in the nature of a premium delivery service and that it is permitted to provide the service pursuant to its special facilities Terms and Conditions.

Second, CMP argues that, if the Commission disagrees with its position that the proposed backup generators do not constitute "generation assets" under the Restructuring Act, then it should approve the provision of backup generators to customers generally by finding such activity to be necessary for CMP to satisfy its T&D obligations in an efficient manner under 35-A M.R.S.A 3204(6). Specifically, CMP argues that it should be allowed to provide backup generators when doing so is the most cost-effective means to provide enhanced reliability requested by customers.

Third, CMP argues that enhanced reliability of the functions performed by its affiliates, Utility Shared Services and Energy East Management Corporation, have a direct impact on CMP's efficient operations. These functions include accounting, accounts payable, cash management, payroll, risk management, and all other financial services. CMP states that a high level of reliability for these functions is necessary for CMP to function efficiently and that this continues to be the case during power outages. CMP indicates that, although it originally sought blanket approval to provide similar services to any customer so as to avoid any appearance of preferential treatment to its affiliates, it is willing to accept approval for this one transaction on a non-precedential basis.

Finally, CMP argues that the Commission has already determined that it has the statutory authority to allow CMP to provide backup generation equipment to its affiliates when it approved a support services agreement among the entities. *Request for Approval of Affiliated Interest Transaction, Order Approving Stipulation,* Docket No. 2001-178 (July 10, 2001). That agreement allows CMP to provide "energy services" to its affiliates, a term that CMP asserts is broad enough to cover the proposed service.

B. Intervenors

The Intervenors all make similar arguments in opposition to CMP's request. The Intervenors state that CMP's proposed back-up generators are clearly generation assets as defined by the Restructuring Act and, accordingly, it is prohibited from owning or having any other financial interest in the generators. Therefore, the service cannot be provided by CMP pursuant to its special facilities Terms and Conditions.

The Intervenors also argue that the statutory provision, 35-A M.R.S.A. § 3204(6), that allows a T&D utility to own generation if the Commission finds it necessary for the utility to operate in an efficient manner is inapplicable in this case. The Intervenors' argument is that a back-up generator installed on a customer's premise is not "necessary" for CMP to perform its T&D utility functions. Such a generator provides no transmission or distribution function; rather, it simply provides energy to the customer when there is a T&D service outage. The Intervenors thus argue that a backup generator does not actually enhance distribution reliability because it simply turns on when the distribution system fails. According to the Intervenors, section 3204(6) was intended to allow utilities to own small generation to help support the distribution system in weak areas; it was not intended to authorize T&D utilities to own generators to serve retail load and there is no indication that grid support is needed in the New Gloucester area. Because CMP's proposed service has nothing to do with providing support to the T&D system or with minimizing T&D system costs, the Intervenors argue that it cannot be authorized under section 3204(6).

In response to CMP's argument regarding the need for the reliable operation of its affiliates, the Intervenors state that argument goes to far. CMP can outsource to affiliates or non-affiliates many of the services, supplies and equipment that it needs to operate, but this cannot mean that CMP can provide backup generators to each of its suppliers. The Intervenors state that there has been no showing that the loss of these services during an outage would disrupt the utility's ability to perform its obligations in an efficient manner.

The Intervenors also argue that the Commission approved support services agreements should not be interpreted as authorizing CMP to provide the proposed service to its affiliates. The Intervenors note that there is no indication that the issue of providing backup generation was specifically raised and that the Commission cannot override a statutory prohibition through the approval of a support services agreement.

Finally, the Intervenors point out that there appears to be no particular reason why CMP's affiliates cannot purchase or lease back-up generators from unregulated businesses that provide such services. The Intervenors state that CMP has not made a case that there would be any particular advantage to CMP owning the backup generation units.

C. Stipulating Parties

In support of their proposed stipulation, CMP and the IECG state that CMP, like any other entity, should be free to provide backup service to itself and its related entities. They note that CMP has historically provided backup generation to itself and its affiliates and the functions that are now performed by its affiliates in New Gloucester were historically performed by CMP in its general offices. In addition, the IECG argues that the divestiture provisions of the Restructuring Act were intended to apply only to generation used for the retail or wholesale provision of generation service, not to generation used by a utility or its affiliates for backup service. Accordingly, the IECG states that the Restructuring Act does not prohibit utility generation ownership either for purposes of providing backup generation to itself or to its affiliates.

III. DISCUSSION

For the reasons discussed below, we agree with the Intervenor arguments and conclude that the Restructuring Act does not allow CMP to own backup generators for the purposes described in this case. Accordingly, we cannot approve the proposed stipulation because it does not meet our criteria for accepting such agreements. As stated in numerous cases, the Commission applies the following criteria in considering stipulations:

> - whether the parties joining the stipulation represent a sufficiently broad spectrum of interests that the Commission can be sure there is no appearance or reality of disenfranchisement;
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> - whether the process that led to the stipulation was fair to all parties; and
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> - whether the stipulated result is reasonable and not contrary to legislation mandate.

Central Maine Power Company, Proposed Increase in Rates, Docket No. 92-345(II) (June 10, 1995). Because we conclude that the stipulated result is contrary to the

divestiture provisions of the Restructuring Act, the third criterion stated above has not been satisfied and we must therefore reject the proposed stipulation.[2]

Among the most fundamental aspects of Maine's Restructuring law are its generation divestiture provisions. The Restructuring Act, with limited specific exceptions, required utilities to "divest all generation assets and generation-related business activities." 35-A M.R.S.A. § 3204(1). In addition, the Act prohibits utilities from owning, having a financial interest in or otherwise controlling "generation or generation-related assets." 35-A M.R.S.A. § 3204(5). The Act does permit an exception to the generation ownership prohibition in circumstances in which the Commission finds such ownership to be "necessary for the utility to perform its obligations as a transmission and distribution utility in an efficient manner." 35-A M.R.S.A. § 3204(6).

The first issue before us is whether backup generators owned by CMP for the purposes discussed in its filings constitute generation or generation-related assets under the Restructuring Act. The Act contains a definition of "generation assets" that states:

> Generation assets includes all real estate, fixtures and personal property owned, controlled, operated or managed in connection with, or to facilitate, the generation of electric power.

35-A M.R.S.A. § 3201(10). We conclude based on the ordinary use of language and the plain meaning of the above definition that the backup generators CMP proposes to own in this case are generation or generation assets under the Restructuring Act. Backup generators and associated equipment are used to generate electricity and do not act to transmit or deliver power. Thus, the provision of backup generators cannot be considered a T&D service and must be considered generation for purposes of the divestiture provisions of the Restructuring Act. As a consequence, CMP may not provide backup generators as a T&D service pursuant to its special facilities Terms and Conditions.[3]

The next issue is whether we can authorize CMP to provide the backup generators pursuant to section 3204(6), which requires us to find that such action is necessary for the utility to perform its T&D obligations in an efficient manner. We conclude that section 3204(6) was not intended to apply in the circumstances of this case. We agree with the Intervenors that section 3204(6) was included in the Restructuring Act for the general purpose of allowing utilities to use distributed generation to provide support in weak areas of the T&D system when doing so would be less costly and more efficient than system

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[2] Because we conclude that the third criterion has not been satisfied, we do not address whether the first two criterion have been satisfied. In particular, we do not decide whether a stipulation executed by CMP and the IECG (but not executed by several other intervenors – including the Public Advocate) would satisfy the first criterion.

[3] If we were to conclude that CMP could provide backup generators as a T&D service under its Terms and Conditions, issues would arise as to whether backup generation is a utility service and, if so, whether any other entity could provide backup generators without Commission approval pursuant to 35-A M.R.S.A. § 2102.

upgrades. In our view, section 3204(6) was intended to allow utilities to use generation within their systems for grid support, not to provide generation service to retail customers in the event of T&D system outages.[4] Because there is no claim of system problems in the New Gloucester area and the proposed generators would be used to provide electricity to retail customers in the event of T&D system outages, we cannot find that CMP ownership of backup generators in this case is necessary for it to perform its obligations in an efficient manner as required by section 3204(6).

Similarly, CMP's argument that the uninterrupted operations of its affiliates in New Gloucester are necessary for CMP to function efficiently must also fail. As stated above, the general purpose of section 3204(6) is to allow T&D utilities to use generation within their systems so that power can be delivered over the grid in the most efficient manner.[5] The section does not permit utilities to provide backup generation service to individual customers. We concur with the Intervenors that if it is important for CMP's affiliates to maintain operations during power outages, there appears to be no reason why the affiliates cannot obtain necessary backup generation services from the unregulated market.

We also reject CMP's argument that somehow the Commission has already approved the provision of backup generation services to it affiliates by approving a support services agreement that allows for the provision of "energy services." The issue of whether backup generation services could be provided consistent with the Restructuring Act was not raised in that proceeding and we cannot override statutory prohibitions through Commission order.

Finally, we address the argument that the proposed stipulation should be approved because CMP historically provided backup generation to itself and affiliates and that the Restructuring Act was not intended to apply to either situation. In our view, a fundamental purpose of the Restructuring Act was to prohibit T&D utilities from using generation or generation-related assets to provide services to third parties. There is no indication that the Restructuring Act intended to create an exception for service to utility affiliates.[6] The

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[4] In its exceptions, CMP states that the Examiner's Report misconstrues section 3204(6) by concluding that the "sole purpose" of the provision is to allow utilities to use distributed generation to provide support in weak areas of the T&D system. The Report did state that the section was intended to apply in such circumstances, but did not state that it is its sole purpose. There may be other circumstances in which it would be appropriate to apply section 3204(6). This Order finds only that, upon the facts presented in this case, section 3204(6) is not applicable.

[5] This provision is sensible in that T&D utilities are uniquely positioned to own or control generation within their systems so as to minimize overall system costs.

[6] We note that the precedent that would be created by accepting the argument that CMP may provide backup service to its affiliates under section 3204(6) cannot logically be limited to affiliates. The logic would apply to any non-affiliated third party that provides services to CMP.

generation ownership exception contained in section 3204(6) cannot apply in this case because it is not "necessary" for CMP to provide this service in that its affiliates can own the backup generation themselves or obtain the service from a third party other than CMP.[7]

For the reasons discussed above, CMP cannot provide backup generators to its affiliates as described in its filings in this case.

Dated at Augusta, Maine, this 4th day of May, 2004.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

[7] The issue of whether CMP can lawfully own or provide backup generation to itself is not presented in this case. However, we do not view the Restructuring Act as prohibiting such activity. Utility provision of backup generation to itself does not implicate the concerns of service provision to third parties. In addition, a finding that section 3204(5) applies to utility backup generation would result in the complete inability of T&D utilities to take advantage of backup generation. This is because a utility would necessarily either have to "own" or "otherwise control" (such as through a lease arrangement) the backup generation. A complete prohibition upon utility use of backup generation is not consistent with any of the underlying purposes of the Restructuring Act and such an interpretation would clearly lead to an absurd result. *See Kimball v. Land Use Comm'n*, 2000 ME 20 ¶ 18, 745 A.2d 387, 392 (statutory construction should not lead to an absurd result). Further, if section 3204(5) were found to be applicable, a finding could be made under section 3204(6) that it is "necessary" for CMP to own or otherwise control backup generation because there is no other means for CMP to take advantage of the reliability provided though the use of backup generation.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.